

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Expanding the Economic and Innovation)	Docket No. 12-268
Opportunities of Spectrum Through)	
Incentive Auctions)	

To: The Commission

**COMMENTS IN RESPONSE TO
NOTICE OF PROPOSED RULEMAKING**

Howard A. Topel
Brian M. Madden
F. Scott Pippin
Lerman Senter PLLC
2000 K Street, NW, Suite 600
Washington, DC 20006-1809
Tel. 202-429-8970

Counsel to KAZN License, LLC

TABLE OF CONTENTS

SUMMARY	iii
I. BACKGROUND	2
II. THE COMMISSION’S PROPOSAL TO PROTECT ONLY LICENSED STATION FACILITIES AS OF THE DATE OF ENACTMENT OF THE SPECTRUM ACT IS NOT SUPPORTED BY THE STATUTE OR LEGISLATIVE HISTORY	7
III. THE TWO STATED EXCEPTIONS TO THE COMMISSION’S STRICT PROPOSAL TO PROTECT ONLY THE COVERAGE AREAS AND POPULATIONS SERVED UNDER EXISTING BROADCAST LICENSES DISCRIMINATE AGAINST OTHER, SIMILARLY SITUATED AUTHORIZATION HOLDERS WITHOUT A REASONED EXPLANATION AS REQUIRED BY PRECEDENT	9
IV. CONCLUSION.....	13

SUMMARY

In the Notice of Proposed Rulemaking released October 2, 2012, the Commission proposes that the repacking procedures it will adopt in implementation of the Spectrum Act will only protect the coverage areas and populations served by broadcast facilities that were *licensed* as of February 12, 2012, the date of enactment of the Spectrum Act. Broadcast station licensees that on that date possessed valid construction permits for modification of their licensed facilities would receive *no* protection for the coverage areas and populations to be served by the modified facilities once built.

KAZN License, LLC (“KAZN”), licensee of Station KILM(DT), Barstow, California, and holder of a construction permit authorizing the construction of expanded station facilities for KILM to operate with Distributed Transmission Systems (“DTS”) technology, strongly disagrees with this interpretation of the Spectrum Act. The Commission’s proposal to exclude from protection unbuilt facilities that have been authorized by outstanding construction permits issued prior to the date of enactment of the Spectrum Act is unsupported by the language of the Spectrum Act, its legislative history, or by Commission precedent and practice. Furthermore, while the Commission has expressly identified two classes of construction permit holders that *will* receive protection of their authorized, but unbuilt, facilities throughout the repacking process – stations with construction permits for new, unbuilt full power television stations and Class A low power stations with construction permits for conversion to digital operation – the Commission failed to explain why only these two types of permittees should be protected, but not others. Licensees (such as KAZN) that have been issued construction permits for modification of their station facilities have at least the same reliance interest in protection of the expanded coverage areas and populations to be served by their improved operations as the two classes of permittees favored by the Commission’s proposal. Without a full, reasoned

explanation for disparate treatment of similarly situated permit holders, the Commission has failed to satisfy the long-standing requirements of *Melody Music* and its progeny.

Relying on the rights granted to it in a construction permit authorized prior to enactment of the Spectrum Act, KAZN has diligently proceeded with plans to implement complex and costly DTS technology to achieve a substantial improvement in KILM's coverage area, notably to underserved areas and populations in rugged mountainous areas. These improvements in coverage fulfill a core component of the Commission's expectations in authorizing DTS operations. The failure to protect the broad enhancement of the KILM service area throughout the repacking process would unlawfully deprive KAZN and the public of the assurance of future service resulting from implementation of the KILM DTS construction permit, and would preclude for more than 124,000 currently underserved people the television service which KILM will very soon begin to provide from its DTS facilities.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Expanding the Economic and Innovation)	Docket No. 12-268
Opportunities of Spectrum Through)	
Incentive Auctions)	

To: The Commission

**COMMENTS IN RESPONSE TO
NOTICE OF PROPOSED RULEMAKING**

KAZN License, LLC (“KAZN”), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission’s rules, hereby submits these comments in response to the *Notice of Proposed Rulemaking* (the “NPRM”) in the above-captioned proceeding.¹ The NPRM proposes, among other things, rules and policies that will govern the protections afforded to television broadcast stations in the repacking process that the Commission proposes in connection with its implementation of the “Spectrum Act.”² In these Comments, KAZN seeks to call to the Commission’s attention serious issues that KAZN believes must be addressed and resolved in connection with the establishment of these new rules and policies – namely, the protection throughout the repacking process of coverage areas and populations served by broadcast facilities authorized by a valid construction permit but not licensed by the date of enactment of the Spectrum Act.

¹ *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, FCC 12-118 (rel. Oct. 2, 2012).

² *See Middle Class Tax Relief and Job Creation Act of 2012*, Pub. L. No. 112-96, §§ 6401 – 6414, 125 Stat. 156 (2012). In the NPRM, the Commission refers to Title VI of the Middle Class Tax Relief and Job Creation Act of 2012 as the “Spectrum Act.” *See* NPRM at 12.

I. Background

KAZN is the licensee of Station KILM(DT) (Facility Identification No. 63865), a full-power, commercial television station licensed to Barstow, California. The principals of KAZN acquired control of the station in November 2007 (*see* FCC File Nos. BTCCT-20070829AAS and BALCT-20071109AEF). For several years prior to, and ever since the consummation of, these transactions, the principals of KAZN have been actively working with their engineering consultant, S. Merrill Weiss and the Merrill Weiss Group, LLC (“MWG”), to explore and implement substantial improvements in the operation of KILM. With the advent of digital operations, MWG has been “the principal proponent of DTS,”³ or distributed transmission systems, a technology that employs multiple synchronized transmitters from several locations around a station’s service area. Each transmitter operates on the same digital channel, and “adaptive equalizer” circuitry and synchronization allow the system to “cancel and combine [the signals from the multiple transmitters] to produce a single signal.”⁴ In authorizing DTS operations, the Commission found that

... DTS can provide service to areas that a single-transmitter station would fail to reach due to natural or man-made obstructions that would block the signal coming from the single-transmitter site. It can provide more uniform signal levels throughout a station’s service area, making indoor reception more reliable. Also, multiple DTS transmitters generally operate at a lower power than a single transmitter to achieve the same coverage and thereby reduce the likelihood of causing interference to neighboring licensees.⁵

³ *In the Matter of Digital Television Distributed Transmission System Technologies*, Clarification Order and Notice of Proposed Rulemaking, 20 FCC Rcd 17797, 17800 (2005) (“DTS NPRM”).

⁴ *In the Matter of Digital Television Distributed Transmission System Technologies*, Report and Order, 23 FCC Rcd 16731, 16733 (2008) (“DTS R&O”).

⁵ DTS R&O at 16734.

Notably, the Commission also concluded that the “[u]se of DTS is ... more spectrum efficient than use of translators because DTS uses the stations’ already allotted frequency, whereas translators require one or more additional frequencies.”⁶

DTS technology was particularly advantageous for KILM’s operation, as the station’s service area is severely limited by the exceedingly mountainous terrain of the San Gabriel Mountains of California. The Commission expressly recognized that “DTS will be especially useful in mountainous areas where single transmitters have been unable to reach viewers in valleys or those blocked by elevated terrain.”⁷ Since the DTS NPRM was first issued in 2005, MWG has worked with KAZN’s principals to design operations that would allow KILM to overcome the natural effects of the severe terrain and to greatly expand its service population, especially into areas that had been underserved. Following the adoption of the DTS rules, Mr. Weiss and KAZN representatives had frequent contact with members of the staff of the Media Bureau in connection with the filing in 2009 of the application to utilize DTS technology at KILM (FCC File No. BMPCDT-20090601AAG).

One measure of the benefit of DTS operation by KILM is the predicted increase in overall population to be served by the station once it has completed the construction of its facilities employing DTS technology: from its licensed single-transmission site, KILM serves 639,798 viewers; whereas employing three DTS-synchronized transmitters, the station is predicted to provide service to more than 14,350,000 viewers.⁸ Another measure of the benefit

⁶ *Id.* This finding is especially relevant to this proceeding, as translators are proposed to receive no protection through the repacking procedures, and many viewers who depend on translator service may lose service as a consequence.

⁷ *Id.* at 16732.

⁸ *See* Supplementary Technical Statement for Amendment #2 to FCC File No. BMPCDT-20090601AAG at pp. 8-9.

to be derived from KILM's use of DTS technology is the "expan[sion of] service into traditionally underserved rural areas in which populations have historically been insufficient to sustain a viable, full-service over-the-air station,"⁹ a primary objective of the Commission in the adoption of the DTS rules. Using DTS technology, KILM is predicted to provide a second television service to more than 24,000 people, and new television service to an overall underserved population of more than 124,000 viewers.¹⁰

Because KILM's service area is in the Mexican border zone, it was necessary to obtain Mexican concurrence for the DTS proposal. Among the numerous assurances provided to the Mexican authorities was that KILM would employ specially-designed antennas to produce no interference to stations within Mexico and to protect existing service in the U.S. by authorized Mexican stations. There is no bilateral agreement with Mexico regarding the use of DTS technology, and obtaining Mexican concurrence for the three-transmitter operation proposed for KILM was very time consuming and required extensive consultation with the staff of the Commission's International Bureau. As a result of these efforts and after several letters were sent to Mexico by the staff of the International Bureau, consent from Mexico to the KILM application was received in the fall of 2011.

On November 4, 2011, less than four months before the enactment of the Spectrum Act, the Commission granted KILM's application to construct two new transmission facilities to augment existing operations and to employ DTS technology. The construction permit

⁹ DTS R&O at 16753.

¹⁰ See Supplementary Technical Statement for Amendment #2 to FCC File No. BMPCDT-20090601AAG at pp. 8-9, and the Engineering Statement of Smith and Fisher, LLC, dated August 9, 2009, at Figure 5, attached as Appendix A thereto.

authorizing the DTS facilities (the “KILM DTS CP”)¹¹ is valid through November 4, 2014. Since the grant of that authorization, KAZN has diligently proceeded with preparations and arrangements for construction, and has ordered specially-designed equipment at substantial cost. Site and infrastructure consultants have studied each of the transmitter sites to ready them for installation of the antennas. A lease for one of the new transmitter sites has been signed, and a lease for the other has been negotiated. As of the date of submission of these Comments, one antenna, costing approximately \$170,000, is en route to California by ship from Australia; the second antenna was ordered at the same time and will follow shortly. Two transmitters have been ordered and are scheduled for delivery in February and March 2013. KAZN anticipates that, in the absence of unforeseen complications, KILM will commence DTS operation from the first two transmitter sites in March 2013, with the full system scheduled to be operational by June 2013; activation of the third site has been delayed due only to its inaccessibility for construction during the winter and spring, when the site is typically buried in snow. To date, KAZN has paid or authorized the expenditure of more than \$1,620,000, and total costs for the DTS system for KILM are expected to exceed \$2,000,000.

On October 2, 2012, the Commission released the NPRM. In it, the Commission proposes that the repacking procedures it will adopt under the directives of the Spectrum Act will protect the coverage areas and populations served by broadcast facilities that were *licensed* as of February 22, 2012, the date of enactment of the Spectrum Act, a proposal which the Commission indicates it believes is, as a general matter, compelled by the terms of the law. This means that for KAZN, and other licensees that hold validly issued construction permits for modification of their licensed facilities, undertaking construction pursuant to the permit in a timely manner and

¹¹ Construction Permit No. BMPCDT-20090601AAG, granted November 4, 2011.

in reliance upon the rights and assurances which have always been inherent in such authorizations, does not entitle the station to *any protection* for the coverage areas and populations served by the modified facilities once those facilities are built and operation begins. Were the Commission to adopt the proposal advanced in the NPRM, the construction now underway by KAZN in accordance with the KILM DTS CP – a valid, unexpired authorization issued before the Spectrum Act was agreed to and adopted – will have been undertaken at KAZN’s risk and the service to be provided by KILM well before any decision in response to the NPRM is reached will *not* be assured of protection by the Commission in the repacking process, except to the extent of the terrain-limited, pre-DTS operation of the station. At no point was KAZN ever given any prior notice that the time, effort and resources it has devoted over many years to improve the operation of KILM could be rendered worthless through repacking pursuant to the Spectrum Act.

KAZN fervently disagrees with the Commission’s draconian interpretation of the Spectrum Act which could lead to the results discussed immediately above. The Commission’s interpretation is unsupported by the language and context of the legislation as enacted, has not been enunciated in legislative history, and is in conflict with established Commission precedent and practice. These possibilities are so drastic that the Commission itself acknowledges that while the Spectrum Act “mandates preservation only of certain licensed facilities, we do not interpret it to prohibit the Commission from granting protection to additional facilities where appropriate.”¹² But in the NPRM the Commission proposes to protect the coverage areas and populations served by the unbuilt facilities of only two classes of permittees – those with construction permits for new, unbuilt full-power television stations and those with construction

¹² NPRM at ¶ 113 and n.169.

permits for digital conversion of Class A stations.¹³ These permittees are not distinguishable in any meaningful manner from KAZN and its permit for construction of the KILM DTS facilities. As demonstrated in the following material, the Commission’s proposal to deny protection throughout repacking to KILM’s full, authorized modified facilities would deprive many underserved people of expected television service resulting from the very objectives cited by the Commission in adopting the DTS rules in 2008, and would unlawfully deprive KAZN of the benefits and protection it deserves when it acts to construct the improved KILM facilities in a timely and responsible manner pursuant to the station’s authorized construction permit.

II. The Commission’s Proposal to Protect Only Licensed Station Facilities as of the Date of Enactment of the Spectrum Act is Not Supported by the Statute or Legislative History

In the NPRM, the Commission makes much of the Spectrum’s Act’s references to “broadcast television licensee[s].”¹⁴ From an isolated reference of that term in Section 6403(b)(2) of the Act, the Commission intuits that *only* facilities licensed as of February 22, 2012 (and not those for which valid permits have been granted) deserve protection throughout the repacking process. This position is simply not sustainable.

Section 6403(b)(2) states:

FACTORS FOR CONSIDERATION.—In making any reassignments or reallocations under paragraph (1)(B), the Commission shall make all reasonable efforts to preserve, *as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee*¹⁵

¹³ NPRM at ¶¶ 114-115.

¹⁴ See, e.g., *id.* at ¶¶ 73-74.

¹⁵ Pub. L. No. 112-96, §§ 6403(b)(2) (emphasis added).

The Commission interprets this language as a “mandate”¹⁶ to protect only “facilities that were licensed”¹⁷ as of February 22, 2012, the “date of the enactment” of the Spectrum Act. But nothing in Section 6403(b)(2) (or elsewhere in the Spectrum Act) compels this interpretation. More plausible is that “the date of the enactment of [the Act]” was intended as a cutoff date to protect the status quo of broadcast television licensees – valid construction permits included. Certainly, there is other language in Section 6403 (and in other sections of the Spectrum Act) that supports this reading. Subsection (a)(1) of Section 6403 refers to a broadcast television licensee’s “broadcast television spectrum usage rights;” such “usage rights” would include those afforded by a valid construction permit – a licensee is entitled to “use” that which has been constructed in a timely manner in accordance with the terms of a valid authorization. Subsection (b)(4)(B) refers to “spectrum assigned to the licensee.” A construction permit “assign[s] to the licensee” the right to use certain spectrum in a specified manner. Lastly, Section 6001(6) defines “broadcast television licensee” as “the licensee of (A) a full power television station or (B) . . . a Class A television station.” In normal usage, a “television station” would be understood to include the station’s current facilities and those validly authorized by an outstanding and unexpired construction permit.

The legislative history of the Spectrum Act, what little there is of it, does not offer any support for the Commission’s interpretation of what facilities should be protected. There is no discussion in any legislative history of the current or the earlier versions of the Spectrum Act of the meaning in this context of the term “broadcast television licensee,” and no indication that Congress intended to eviscerate the settled rights of permit holders and to nullify the

¹⁶ NPRM at ¶ 113.

¹⁷ *Id.*

Commission’s longstanding practice of recognizing and protecting facilities authorized in construction permits. If Congress intended the Spectrum Act to upend the broadcast regulatory regime in such a fashion, it would have been expected to make its intent much more explicit.

KAZN submits that there is no rational basis for the Commission’s conclusion that the Spectrum Act precludes protection during the repacking process for those facilities that are the subject of a valid, unexpired construction permit authorized and held by a television licensee as of the date of the enactment of the law.

III. The Two Stated Exceptions to the Commission’s Strict Proposal to Protect Only the Coverage Areas and Populations Served under Existing Broadcast Licenses Discriminate Against Other, Similarly Situated Authorization Holders Without a Reasoned Explanation as Required by Precedent

After asserting that the Spectrum Act “mandates preservation only of certain licensed facilities,”¹⁸ the Commission recognizes the inherent inequity in this approach and grants exceptions to two categories of licensees: those with “facilities authorized in unbuilt construction permits for new full power television stations as of February 22, 2012,”¹⁹ and “certain digital Class A facilities that were not licensed as of February 22, 2012.”²⁰ While KAZN agrees that the facilities of these licensees deserve protection during repacking, it can discern no valid reason why such protection would extend only to these two classifications of licensees. The reliance interests of new station and digital Class A permittees are no greater, or less, than those of station licensees that hold permits granting rights to build other modified facilities. Under longstanding

¹⁸ *Id.*

¹⁹ *Id.* at ¶ 114.

²⁰ *Id.* at ¶ 115.

principles of administrative law, the Commission cannot discriminate within a class of similar licensees without a reasoned explanation,²¹ yet this is precisely what is proposed in the NPRM.

Given the Commission's insistence that the Spectrum Act mandates protection only for "full power and Class A television *licensees*,"²² its decision to exempt permit holders for new full power television stations is particularly peculiar. Permittees for new stations are not "licensees" of any particular sliver of spectrum, and no service has been implemented. Thus, under a "plain language" reading of the Spectrum Act, such permit holders would not be entitled to protection during repacking. Nonetheless, the Commission has chosen to exempt new station licensees from the harshness of a February 22, 2012 "cutoff," reasoning that "[t]hese permittees obtained their construction permits through participation in an auction or an NCE point proceeding"²³ For a permittee for new full power commercial service, its only claim for protection is that it spent more money in a prior auction than any other bidder, and by doing so, it expected that the Commission would honor the resulting authorization. By that metric, undertaking steps to implement construction under an outstanding permit for station modification generates the same reliance interest as that of the new station permit holders proposed to be protected by the Commission – licensees with construction permits to modify their facilities have planned and will expend considerable resources to improve their operations under permits already issued by the Commission. Certainly, this is the case for KAZN in the completion of

²¹ See *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) ("*Melody Music*").

²² NPRM at ¶ 73 (emphasis added).

²³ *Id.* at ¶ 114. Similarly, merely having prevailed in an NCE point proceeding does not explain why an NCE point preference "winner" would be entitled to protection during repacking and the DTS facilities of KILM would not. Competing NCE applicants are compared in a point proceeding based on public interest factors; the DTS authorization issued for KILM was granted upon a showing of a substantial service to underserved populations. See discussion *supra* at pp. 3-4.

construction of the DTS facilities for KILM. The Commission cannot treat new station permit holders (who are not yet “licensees”) in a different manner from station licensees holding permits to modify licensed facilities without a far more detailed explanation of the material distinctions between the two categories of permittees than is offered in the NPRM.²⁴ KAZN believes that no such explanation is possible.

To an even greater extent, the Commission’s arguments for extending protection to “certain digital Class A facilities,”²⁵ despite the fact that these facilities were not “licensed” as of the date of enactment of the Spectrum Act, apply equally to existing construction permit holders, and particularly to KAZN. The Commission observes in the NPRM that “Class A licensees made their digital conversion plans in reliance on the rules the Commission adopted in July 2011.”²⁶ All licensees who hold validly authorized construction permits have “made . . . plans in reliance” on Commission rules – be they technical rules, ownership rules, or, in the instance of DTS permit holders like KAZN, rules creating an entirely new broadcast transmission technology. While Class A licensees may have “made plans” based on rules issued in July 2011 (which do not require digital conversion until September 2105), KAZN also “made plans” for the now imminent activation of substantial improvements in the operation of KILM based on the DTS rules issued in November 2008 and the KILM DTS CP issued in November 2011. Thus, it can be argued that the weight of the reliance interests of KAZN with respect to the protection of the service to be provided by the DTS facilities *exceeds* that of Class A licensees, given the more

²⁴ See *Bryan Broadcasting Corporation*, 27 FCC Rcd 8058, 8060 (“[S]imilarly situated parties may not be treated in a disparate manner without an adequate reasoned explanation.”) (*citing Melody Music*).

²⁵ NPRM at ¶ 115.

²⁶ *Id.*

extensive passage of time since the operative rules were adopted and the sooner activation of the improved KILM operation.

The Commission also argues that “failing to protect [Class A licensees] . . . would be fundamentally unfair to such licensees and would deprive the public of important benefits.”²⁷ The same concern is warranted for the holder of any valid construction permit for modified facilities, particularly KAZN and its authorization to build the DTS operation of KILM. KAZN had *no* prior notification that the rights granted in its construction permit would be undone by the Commission’s implementation of the repacking plan. Given the Commission’s promotion of DTS as “an important tool for providing optimum signal coverage for their viewers;”²⁸ the passage of time since the DTS rules were put in place in 2008; KAZN’s substantial expenditures of time, effort, and financial outlays; and its reliance on the Commission’s DTS decisions and the grant of the authorization to construct the DTS facilities of KILM, nothing could be more “fundamentally unfair” than rendering the KILM DTS CP an effective nullity by declining to protect and preserve throughout the repacking process the broadcast service improvements authorized by that permit.

In the same manner as the Commission recognizes failing to protect Class A stations “would deprive the public of important benefits,”²⁹ failing to preserve the expanded areas and populations served by the KILM DTS CP would negatively impact the public interest. The Commission expects that the launch of DTS will achieve significant public benefits, perhaps only capable of realization by DTS technology: “DTS will allow stations to reach viewers that

²⁷ *Id.*

²⁸ DTS R&O at 16732.

²⁹ NPRM at ¶ 115.

would not otherwise be served by conventional means. This includes reaching rural and remote areas.”³⁰ For KILM, the public interest benefits of DTS operations are manifest – an increase in population served from 639,798 to more than 14,350,000 people, and the provision of service to more than 124,000 now underserved viewers. Yet these public benefits are now very much threatened by the Commission’s proposed discrimination among which facilities deserve protection during repacking.

In proposing to grant protection during repacking to only two categories of construction permit holders, the Commission has afforded disparate treatment within a single licensing class of similarly situated parties without adequate explanation and reasoning – an action that is expressly prohibited by the *Melody Music* line of cases.³¹

IV. Conclusion

KAZN submits that the decision to protect during repacking the coverage areas and populations served by only station facilities licensed as of February 22, 2012, with the limited exception of only two categories of construction permit holders, is wrong and unsustainable. At a minimum, the Commission should either modify its interpretation of the term “broadcast television licensee” so as to include not only station licenses but also all outstanding and unexpired construction permits, or to extend the exceptions to its stated policy to include protection for facilities authorized by construction permits outstanding as of the date of

³⁰ DTS R&O at 16738.

³¹ See *Melody Music*, *infra* n.21.

enactment of the Spectrum Act, including the permit issued to KAZN to construct and operate KILM's modified facilities using DTS technology.

Respectfully submitted,

KAZN LICENSE, LLC

By: /s/ Brian M. Madden

Howard A. Topel

Brian M. Madden

F. Scott Pippin

Lerman Senter PLLC

2000 K Street, NW, Suite 600

Washington, DC 20006-1809

(202) 429-8970

January 25, 2013

Its Attorneys